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IN THE

Supreme Court of the United States

OCTOBER TERM,

No. 77-113

REA EXPRESS, INC., on its own behalf and on behalf of certain of its former employees now retired,
Petitioner,

v.

THE TRAVELERS INSURANCE COMPANY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REA Express, Inc., ("REA"), through its trustee in bankruptcy, C. Orvis Sowerwine, petitions for a writ of certiorari to review a judgment in the above entitled case by the United States Court of Appeals for the District of Columbia Circuit. The judgment affirms in part and reverses in part a decision of the United States District Court for the District of Columbia.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth at pp. 5a-7a of the appendix annexed hereto. The District Court's opinion is at pp. 18a-19a. It is also reported

as *REA Express, Inc.* v. *Travelers Insurance Co., et al.*, 406 F.Supp. 1389 (1976).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on April 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the reach of this Court's decision in *Bangor Punta Operations* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974), encompasses the circumstances of this case, which include *inter alia* per se antitrust violations, substantial insurance companies not involved in the prior ownership of the plaintiff, creditor fraud, and a subsequent bankruptcy in the interest of which this case is now being pursued.

2. Whether those guilty of per se antitrust violations will be permitted to escape liability altogether if no proper party plaintiff exists under this Court's rulings in *Bangor Punta* and *Illinois Brick*.

3. Whether the District Court improperly used summary judgment to pretermit trial on important factual issues on which defendants' claim of an antitrust exception is based.

STATUTES INVOLVED

The statutes involved are Sections 1-3 of the Sherman Antitrust Act, 15 U.S.C. § 1-3, and §§ 4 and 10 of the Clayton Act, 15 U.S.C. §§ 15, 20, which are set forth in Appendix A annexed hereto.

STATEMENT OF THE CASE

The case presented by this petition is simple, but important. It involves antitrust claims based upon the purchase of group benefits for former employees of the bankrupt, REA Express, Inc. As a result of REA's bankruptcy, the life insurance benefit of the retired employees has lapsed. They and others are creditors of the bankrupt estate. It appears that the assets of the bankrupt will be inadequate to pay *any part* of the claims of the general creditors unless substantial recoveries are obtained from petitioner's antitrust litigation. Claims exceed assets by substantially in excess of $40 million.

The District Court dismissed petitioner's claims with prejudice on the basis of motions for summary judgment by respondents.

In a *per curiam* decision, the Court of Appeals affirmed in part and reversed in part. It affirmed regarding the antitrust claims, stating simply, without analysis, that they "are foreclosed by *Bangor Punta Operations* v. *Bangor & Aroostook Co.*, 417 U.S. 703 (1974)." However, regarding the pendent state claims, the Court of Appeals reversed the District Court's "with prejudice" dismissal, quoting from *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1977). Finally, the Court of Appeals said (7a):

> "It is our view that the insurance claims of former employees of appellant are not part of this litigation, so nothing herein or in the District Court's opinion should be read as affecting those claims. Nor are the claims of creditors of the bankrupt appellant before this court. Consequently any claims they may have against appellees herein also remain unaffected by our judgment and the judgment of the District Court." (Footnotes omitted.)

BASIS FOR FEDERAL JURISDICTION

The District Court's jurisdiction in this case is conferred under Section 4 of the Clayton Act (15 U.S.C. § 15), for violations of the antitrust laws, 28 U.S.C. §§ 1331 and 1337, D.C. Code § 11-501, and under the doctrine of pendent jurisdiction.

The amended complaint alleges *inter alia,* an illegal *per se* price-fixing combination and conspiracy between The Travelers Insurance Company ("Travelers"), the railroad defendants, and their collective bargaining conference committees, in violation of Sections 1, 2 and 3 of the Sherman Act. The complaint also alleges violation of Section 10 of the Clayton Act, based upon the interlocks between railroad officials and REA's Board of Directors, and pendent state claims including breach of fiduciary duty by the interlocked directors, unjust enrichment, and excision of insurance benefits without consideration.

The focal claim of REA revolves around the purchase by REA, then owned and dominated by a railroad-interlocked Board of Directors, of a Travelers group insurance policy for its employees, which required REA to pay the same uniform premiums per employee/month as did the railroads. REA was coerced into participation in the master Travelers policy, since all of REA's officers were under the control of a Board of Directors composed of railroad officers.

The Travelers' master policy uniform premiums were fixed collusively by Travelers and the railroads without reference to the costs of an individual employer. As revealed in discovery, a number of other large insurance companies participated as "re-insurers", further extending the effect of the anti-competitive activity.

Absent competitive bidding and price competition, REA was thus compelled to pay substantially higher uniform rates fixed by the defendants than it could have obtained individually from other insurance companies. By an Amendment 16 to the master policy, adopted without the participation of REA, and in anticipation of its sale by the railroads, insurance under the policy regarding a given class of employees, including previously retired employees, was made to terminate on the date the employer withdrew from the policy. REA did withdraw from the policy and prior to its adjudication as a bankrupt on November 6, 1975, REA obtained insurance coverage for its employees at premiums lower than the uniform premiums conspiratorially fixed by the defendants. When REA was adjudicated a bankrupt, the insurance benefits of its former employees, including the life insurance of those who retired prior to REA's sale by the railroads, lapsed because premiums could no longer be paid.

This illegal *per se* price-fixing conspiracy caused substantial injury to REA, while giving the railroads the benefits from the excess premiums paid by REA and greater profits for Travelers and the large insurance companies participating as re-insurers.

Following three years of extensive discovery through interrogatories and production of documents, REA filed a motion for partial summary judgment based on its belief of undisputed facts related to the above-described illegal *per se* price-fixing conspiracy. The defendant railroads and Travelers filed cross-motions for summary judgment based on this Court's 5-4 ruling in *Bangor Punta.*

REASONS FOR GRANTING THE WRIT

Question I: Whether *Bangor Punta* Encompasses This Case

The holding in *Bangor Punta* was that the controlling shareholder of over 99 per cent of the railroad's stock, Amoskeag Company, the real beneficiary of any corporate recovery, lacked standing to sue in equity on the principle that a stockholder may not reap a "windfall" profit from acts of corporate mismanagement, if he acquires his shares from the alleged wrongdoers after the wrongs occurred. 417 U.S. at 711, 712. The majority relied principally on *Home Fire Insurance Co.* v. *Barber,* 67 Neb. 644, 93 N.W. 1024 (1903).

This petition is based on the importance of resolving the important and novel issue of the conflict between standing to sue for treble damages in a private antitrust suit, under Section 4 of the Clayton Act, for an alleged illegal *per se* price-fixing combination and conspiracy, in violation of the Sherman Act, and standing in an equity suit grounded on private corporate law principles pertaining to corporate waste and mismanagement.

The decision of the District Court, affirmed by the Court of Appeals in a *per curiam* opinion, holding that REA's federal claims are foreclosed by *Bangor Punta,* totally misconceives the rationale and ruling of the majority opinion in that case. The decision also results in an unjust and harsh result, which petitioner believes is erroneous as a matter of law, and not intended by the limited ruling of the *Bangor Punta* majority.

Petitioner's basic position is that the two lower courts indiscriminately applied the decision in *Bangor Punta* to the radically different circumstances in

REA's suit. In doing so, the rulings below are in direct conflict with this Court's series of decisions upholding private treble-damage suits under Section 4 of the Clayton Act as a Congressional enactment to redress injury to a person's property or business causally related to an antitrust violation and as a deterrent to other such violations.

This Court has repeatedly condemned conspiratorial price-fixing as conclusively presumed to be unreasonable *per se* restraints, without elaborate inquiry into the precise injury to competition or the business justification for their use. See *Northern Pacific Railroad Co.* v. *United States,* 356 U.S. 1 at 5 (1958).

The Court has not receded from its condemnation of horizontal, illegal *per se* price-fixing agreements as reflected in the recent application of that rule even to minimum fee schedules of bar associations in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). There the opinion of a unanimous Court stressed that "more comprehensive" language than that of the Sherman Act "is difficult to conceive." 421 U.S. at 787. Conspiratorial price-fixing has been repeatedly regarded by this Court as a classic illegal *per se* Sherman Act violation. The uniform premiums fixed by the defendants in REA's suit, including inordinate profit margins and costs, clearly fall within the Congressional condemnation of concerted price-fixing, which this Court has construed strictly ever since its landmark rulings in *United States* v. *Trenton Potteries Co.,* 273 U.S. 392 (1927) and *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Those rulings were later applied to conspiratorial prices for services in *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485 (1950).

In all those cases, this Court has emphasized the Congressional intent that the strong public policy against price-fixing combinations be construed strictly against any claims of exception thereto.

Petitioner submits that the grounds for granting the writ in this case are as compelling as those recognized by the Court in *Perma Life Mufflers, Inc.*, v. *International Parts Corp.*, 392 U.S. 134 (1968). There Mr. Justice Black's majority opinion revealed that because the ruling by the Court of Appeals "seemed to threaten the effectiveness of the private antitrust action as a vital means for enforcing the antitrust policy of the United States, we granted certiorari . . .", 392 U.S. at 136. In *Radovich* v. *National Football League*, 352 U.S. 445 at 454 (1957), the Court stressed that "requirements to burden the private litigant beyond what is specifically set forth by Congress" should not be added to the antitrust laws by the courts.

For convenient reference, we present below excerpts from the majority opinion in *Bangor Punta* to show that substantial questions exist as to whether its reach encompasses the radically different circumstances of this case.

1. Creditors' Interests

The *Bangor Punta* opinion notes that the action was not brought on behalf of any creditors, that it was never so contended by the plaintiffs, and that "the financial health of the railroad is excellent." Footnote 15, 417 U.S. at 718.

As the District Court below itself recognized, the aspect of this case "perhaps most troubling", is the argument (16a-17a)

> ". . . that the interests of the REA employees and creditors make *Bangor Punta* inapplicable. The caption of the complaint asserts that REA sues in its own capacity and on behalf of its employees. Moreover, REA was adjudicated a bankrupt on November 6, 1975, so that any recovery in this lawsuit would first inure to the benefit of the estate, and be distributed ultimately to the creditors of REA."

The Court of Appeals, in that portion of its *per curiam* opinion quoted above at p. 3, states that "the insurance claims of former employees of appellant are not part of this litigation". However, this is not an insurance claim, but an antitrust claim, the proceeds of which are sought to fund the insurance benefits of the employees which lapsed, converting them into creditors, and to pay other creditors monies to which they are rightfully entitled for furnishing goods and services.

In addition to being contrary to the admonition of *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962), regarding the proper procedure on summary judgment, the handling of this case by the courts below is wholly inconsistent with the fact that under Federal Rule of Civil Procedure 15(b), the pleadings ought to be deemed amended to conform to the proof. This is especially important here since the bankruptcy of REA interceded following the initial pleading in the case, and the "with prejudice" dismissal was on motions for summary judgment. Neither reasons of judicial efficiency nor the limited resources of the bankrupt estate support that cavalier treatment of the antitrust claims which, in the light of present circumstances, are the chief hope of recovery of thousands of creditors.

2. Fraud or Deceit

"Amoskeag does not contend that the purchase transaction was tainted by fraud or deceit. . . ." 417 U.S. at 710.

Count V of the complaint alleges that Amendment No. 16 to the policy, wiping out the vested life insurance benefits of 4,000 employees was adopted by the defendants without consideration to REA. The effect of this amendment was to wipe out the vested life insurance benefits from the railroads' group policy for several thousand employees who retired while REA was still owned by the railroads. These employees are now creditors of the bankrupt as a result. Such a transaction with inadequate consideration, made with intent to hinder or delay either present or *future* creditors, is deemed fraudulent under the Uniform Fraudulent Conveyances Law (adopted in New York where the bankrupt's principal place of business was located). *N. Y. Debtor & Creditor Law* § 276.

While the word "fraud" was not used in the complaint, lack of consideration and breach of fiduciary duty were alleged, and the action was brought by plaintiff on its own behalf "and on behalf of certain of its former employees now retired". Actual "fraud" may be inferred in such circumstances when, as here, the transactions were not at arm's length and the parties were affiliated corporations. See Rosenberg, "Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware," 125 U.Pa. L.Rev. 235 at 259 (1976).

Further, creditor fraud was clearly put in issue by plaintiff's affidavits and its statement of genuine issues of fact necessary to be litigated:

"Amendment No. 16 and the circumstances of the sale of REA were fraudulent with respect to REA, its creditors, employees, retired employees and purchasers." (J.A. 89).

The only further requirement under the Uniform Fraudulent Conveyances Act is insolvency or undercapitalization when the transaction occurred, a circumstance which also was put in issue by the statement of disputed issues (*ibid.*):

"On or about the time of the sale of their REA stock by the railroads, REA was undercapitalized, and the effect of Amendment No. 16, adopted without consideration for REA, was to aggravate that condition as to REA's present and future creditors."

We stress the foregoing discussion of creditor fraud not to establish an independent basis of an action for fraudulent conveyances, but to show that a substantial question exists whether, under *Bangor Punta,* federal antitrust causes of action should be viewed as having been extinguished.

Thus, having in mind that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such material [affidavits, exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion", this case, unlike *Bangor Punta,* must be regarded as one involving fraud or deceit. *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962).

3. Non-Prior Owners

The holding in *Bangor Punta* is premised upon claims against former owners and the inequitable effect

of recovery resulting in a windfall profit for those who purchased stock from them. 417 U.S. 716.

However, the principal defendant in this case is Travelers, a company in no way involved in the prior ownership of REA. Further, discovery in the case revealed collusive price-fixing action between Travelers and other large insurance companies which acted as re-insurers. Like Travelers, the re-insurers were not former stockholders of REA. These other insurance companies are not named as defendants in the complaint, but that is unnecessary. Travelers would be jointly and severally liable for damages resulting from their collusive activity.

Such a situation was not involved in *Bangor Punta,* and it is important that the question of whether collusive activity by non-prior owners with prior owners can be used to insulate the former from joint and several liability for antitrust violations not otherwise protected.

4. Distinction Between Legal and Equitable Causes of Action

The *Bangor Punta* opinion characterizes the action there as "in substance, a typical derivative suit seeking an accounting from the previous controlling shareholder for various acts of corporate waste and mismanagement." 417 U.S. at fn. 13.

On the other hand, the case at bar involves the claim of *per se* Sherman Act violations not involved in *Bangor Punta. Bangor Punta,* like the present case, also involved the claim of Section 10 Clayton Act violations. 417 U.S. at 706, 710. The Section 10 claim was subsumed by the majority under the "corporate waste and mismanagement" category of claims, although the

four dissenting Justices disagreed. No claim of Sherman Act violations was made, however.

Treble damage suits under the Sherman Act have been consistently treated by this Court as legal in nature, not equitable, see *Fleitmann* v. *Welsback Street Lighting Co.,* 240 U.S. 27 (1916), and the merger of law and equity through adoption of the Federal Rules in 1938 was not to cut down on legal remedies, but to supplement them in a single action. See *Ross* v. *Bernhard,* 396 U.S. 531 (1970).

As this Court recently stated in *Illinois Brick Company* v. *State of Illinois,* —— U.S. ——, 45 U.S.L.W. 4611 at 4615, ". . . considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." Prior decisions regarding construction of Section 4 of the Clayton Act, under which the antitrust claims hereunder are brought, are entitled to a "presumption of adherence". *Ibid.*

It therefore is important for a determination to be made in the context of this case whether the presumption of adherence is to be applied to prior decisions that treble damage Sherman Act claims are actions at law, contrasted with the equitable nature of the treatment of the claims in *Bangor Punta,* in order to preserve "the effectiveness of the private antitrust action as a vital means for enforcing the antitrust policy of the United States," the basis upon which this Court granted certiorari in *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134 at 136 (1968).

The inapplicability of the equitable concepts relied upon by the opinion in *Bangor Punta* in an action at law was made clear by Dean Pound's pivotal opinion

in *Home Fire Ins. Co.* v. *Barber* itself, which states that "where a corporation is proceeding at law, . . . the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them" (93 N.W. at 1033), and goes on as follows (93 N.W. at 1035):

> "As we have seen, even if Barber had owned all the stock in the company, he would have had no title to the corporate property, so far as to be able to deal with it in his own rather than in the corporate name. But he was only a majority stockholder. *When he withdrew money or assets of the corporation, and converted it to his own use, there was as clear a conversion as if the transaction had taken place between natural persons. If he concealed and covered up these transactions by availing himself of the opportunity afforded him as secretary and manager of the company, and they were not discovered until a change in management resulted in an investigation of the books, we see no reason why the company should not recover the sums so misappropriated.*" (Emphasis added.)

5. Continuing Injury

The opinion in *Bangor Punta* pointed out that any claim of a continuing injury exception was inapplicable in the circumstances of that case. 417 U.S. at fn. 6.

In the case at bar, on the other hand, the life insurance benefits placed in jeopardy by Amendment No. 16 did not lapse until REA's bankruptcy in 1975 made continuation of the premium impossible. This was over six years after the sale of REA by the railroads, and a situation clearly giving rise to the question of whether it is inequitable to insulate the railroads from antitrust liability because of the continuing effect created by the adoption of Amendment No. 16.

6. The Contemporaneous Ownership Rule

The opinion in *Bangor Punta* relies heavily upon the "contemporaneous ownership" rule as setting forth a principle of equity which governs a suit which the new owners of a corporation cause it to bring against its former parent. 417 U.S. at 711, 712.

We submit that the transmutation of this rule to a governing principle in antitrust litigation is by no means made clear by the fact that a Section 10 Clayton Act claim was included in the allegations of corporate waste and mismanagement which characterized the *Bangor Punta* complaint as a whole.

We have already pointed out that *Bangor Punta* did not involve allegations of *per se* Sherman Act violations.

Another distinction of great importance is the fact that in *Bangor Punta,* there was a relationship between a parent corporation and a subsidiary, whereas in this case, REA was owned by over sixty railroads, not by a single parent.

Petitioner submits that as a matter of law and fact, REA was not correctly considered as a subsidiary corporation.

Not only was *Bangor Punta* correctly regarded as involving a true wholly-owned parent/subsidiary relationship, but the owning parent in that case was not a competitor. REA's sixty-odd stockholding railroad owners, on the other hand, were competitors of REA, and for REA's business. Since no single railroad had anything approaching a majority of the stock, a "combination" was involved each time the railroad-interlocked Board of Directors took action.

The 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws,* at page 30, footnote 106, defined a subsidiary "as a corporation wholly-owned by *a parent or a corporation with a majority of voting stock owned by a parent* and a minority held by non-competitors of the parent only for investment". (Emphasis added.)

Petitioner knows of no antitrust case where 60 companies with widely distributed affiliation by stock ownership has or can claim to be a "parent."

As this Court said in *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593 (1950), common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. Even the label "joint venture" cannot justify, this Court said, "agreements between legally separate person and corporations to suppress competition among themselves and others." 341 U.S. at 598. To the same effect, see *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134 at 141-142 (1938).

In sum, the paramount federal question as presented by petitioner, and on which the antitrust bar urgently needs clarification by this Court, is the fundamental difference stressed in the majority opinion in *Bangor Punta* between private corporate law principles of standing, in what was considered in essence a typical derivative stockholder suit, and the overriding public policy of Section 4 of the Clayton Act in this REA's suit grounded in an illegal *per se* conspiratorial price-fixing agreement.

Unless that basic difference is made clear, the misapplication of the rationale of *Bangor Punta* by the District Court and the Court of Appeals below

threatens to negate and conflict with this Court's repeated pronouncement that the strong incentive of treble damage suits was designed by Congress itself both to redress injury to private parties causally related to antitrust violations—especially illegal *per se* price fixing—and also to serve as a general deterrent to potential antitrust violators. See *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 at 494 (1968); *Radovich* v. *National Football League, supra; Radiant Burner* v. *People Gas Light & Coke Co.,* 364 U.S. 656 (1961); *Continental Ore Co.* v. *Union Carbide & Carbon Co.,* 370 U.S. 690 (1962); *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.,* 381 U.S. 311 at 318 (1965); and *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.,* 394 U.S. 495 at 502 (1969) where the Court said:

> "Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but to vindicate the important public interest of free competition."

Question II: The Impact of *Illinois Brick*

This Court's June 9, 1977 decision in *Illinois Brick Company* v. *State of Illinois,* —— U.S. ——, 45 U.S.L.W. 4611, concerns the treble damage remedy in a "pass-on" situation. Although differing conclusions are reached, the emphasis in both the majority and dissenting opinions is upon making that an effective remedy, not in emasculating it. As stated in the majority opinion (45 U.S.L.W. at 4618):

> "We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, *e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 139 (1968), supports our adherence to the *Hanover*

> *Shoe* rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge."

This result was reached even though the possibility that the direct purchaser as plaintiff might be "over-compensated" was clearly recognized.

Insofar as the case here is concerned, REA is the direct purchaser of the insurance coverage in question. Therefore, unless certiorari is granted to review this important question of who is the proper party plaintiff, *Illinois Brick* may be regarded as saying that the antitrust suit can *only* be brought in the name of REA. Ironically, however, the present law of the case, under the Circuit Court's *per curiam* decision, seems to be that the only party which *Illinois Brick* appears to say may bring the action, is prevented from doing so by *Bangor Punta.*

The seriousness of the problem thus created is not limited to the fact that the preclusion of an antitrust remedy, in view of REA's bankruptcy, has a direct effect upon its creditors by depriving them of the benefit of a treble damage remedy. Deterrence of future antitrust violations is also a chief purpose of the antitrust laws. The importance of deterrence in this case is underscored by the continuation of the collusive relationship between Travelers, the other large insurance companies who are "re-insurers", and the railroads, to this day. And in that context, the assistance offered by the railroads to Travelers and its friends in the insurance industry, by seeking to help stretch the *Bangor Punta* tent to cover them as well, becomes a matter of concern, if the important public purpose embodied in

treble damage actions as a means of enforcing the antitrust laws is to be served.

Question III: The Propriety of Summary Judgment

Poller v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962), warns against indiscriminate and hasty application of summary judgment of dismissal in an antitrust action where there are genuine issues of material fact. *Cf. White Motor Co.* v. *United States,* 372 U.S. 253 (1963).

As pointed out above, issues of creditor fraud have been raised in the statement of disputed factual issues. Proof of motive and intent would be directly relevant to such issues. If creditor fraud is found to exist, the foundation for establishing antitrust recovery through the non-applicability of *Bangor Punta* would appear clear.

Further, Count VII of the complaint raises an issue of unjust enrichment as against Travelers. This is an issue of fact, not a determination to be made on summary judgment. Notwithstanding the issue, the District Court made a determination on unjust enrichment, a clear abuse of discretion.

The railroads can be expected to assert, as they have in the past, that the REA bankruptcy trustee would be overcompensated by treble damages because the amount claimed as damages in this and other pending antitrust actions exceeds the amount of in excess of $40 million by which REA's liabilities exceeded its assets. However, it is well known that the amount of damages pleaded in a complaint, drafted before discovery has taken place, is not evidence, and may tend to be visionary. The prejudice caused by this kind of

fallacious assertion by the railroads can not be used to defeat plaintiff's right to a trial on the issue of damages. If damages in excess of the $40 million deficit are proved, then is the time for the unjust enrichment issue to be confronted, not before.

The importance of such a determination has been increased by this Court's decision, on June 13, 1977, affirming, in Docket 76-1203, the decision of the Interstate Commerce Commission upholding the issuance of more than $27 million in notes from REA to the railroads in 1959. The railroads have filed claims of in excess of $40 million, including the notes and accrued interest, in REA's bankruptcy proceeding, as creditors.* It is paradoxical indeed that those who purchased the express company for only $100,000 in 1929, and as owners were permitted to milk it of millions of dollars over the years from 1929 to 1969, when they sold it for over $2 million plus warrants, in a condition already burdened with in excess of $27 million in notes from REA to themselves, should on one hand "crowd out" other creditors and aggravate the bankrupt's extreme undercapitalization, created by themselves, by filing claims of in excess of $40 million as creditors of REA in its bankruptcy proceeding, and yet be permitted to prejudice still further the interests of the other creditors, such as REA's former employees, by contending that any antitrust recovery, utilized for their benefit, would constitute unjust enrichment.

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* Report of Dermott Noonan, C.P.A., to Robert L. Wright, Esq., special counsel to the trustee, dated September 27, 1976, and filed in the Bankruptcy Court, S.D.N.Y., in Matter of REA Express, Inc., a bankrupt, 75-B-253.

Also anomalous, in the light of this Court's holding that controlling stockholders are fiduciaries to creditors in the event of bankruptcy, see *Pepper* v. *Litton*, 308 U.S. 295, 306-307 (1939), would be a result which, because of *Bangor Punta*, excuses those same former stockholders from antitrust liability for acts which occurred when they were the controlling stockholders, to the detriment of the other creditors including those who were employees at the time, and the objects of their fiduciary duty—by depriving them of the benefits of antitrust claims against the same former stockholders.

This result would stand the controlling stockholders' creditor-fiduciary rule of *Pepper* v. *Litton* on its head. It would be particularly inequitable as to the creditors who are former employees, hired while the railroads still owned the company, whose life insurance, after they retired (at a time when railroad ownership continued) later lapsed because of manipulations placed in issue by this litigation. Former employees are essentially "involuntary creditors". They cannot change jobs at whim without jeopardizing seniority and other benefits built up by years of work. If they have retired, they can do nothing to change their former employment, obviously.

Bangor Punta involves estoppel in a situation limited to the relative equities of the present and former stockholders of a corporation. But in bankruptcy, estoppel as against the former stockholders does not estop the trustee in bankruptcy from pursuing a corporate cause of action for the benefit of the creditors. See 4A *Collier on Bankruptcy* ¶ 70.29[3].

Nor does the concept of a "windfall" profit embodied in *Bangor Punta* have economic validity as applied to the claims of creditors generally. To conclude that those who have not been paid for goods and services furnished by them receive a "windfall" if the trustee in bankruptcy is later enabled to pay their claims by virtue of a treble damage antitrust recovery, would be flagrantly unjust and incorrect as a matter of economic principle; yet that is the result of the decisions below.

Full scale consideration of the reach of *Bangor Punta* in a bankruptcy context therefore is clearly warranted in place of the cursory short circuiting by summary judgment which this case received below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Section 1 of the Sherman Act, 15 U.S.C. § 1.

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 2 of the Sherman Act, 15 U.S.C. § 2.

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Section 3 of the Sherman Act, 15 U.S.C. § 3.

§ 3. Trusts in Territories or District of Columbia illegal; combination a misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 3, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282

Section 4 of the Clayton Act, 15 U.S.C. § 15.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

Section 10 of the Clayton Act, 15 U.S.C. § 20.

§ 20. Purchases by common carriers in case of interlocking directorates, etc.

No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than $50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership, or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers,

directors, and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding, or shall do any act to prevent free and fair competition among the bidders or those desiring to bid, shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall, within thirty days after making the same, file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions, it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section, it shall be fined not exceeding $25,000; and every such director, agent, manager, or officer thereof who shall have knowingly voted for or directed the act constituting such violation, or who shall have aided or abetted in such violation, shall be deemed guilty of a misdemeanor and shall be fined not exceeding $5,000 or confined in jail not exceeding one year, or both, in the discretion of the court.

Oct. 15, 1914, c. 323, § 10, 38 Stat. 734.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 76-1450

REA Express, Inc., on its own behalf and on behalf of certain of its former employees now retired, *Appellant*

v.

The Travelers Insurance Company, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 2141-71)

Argued March 29, 1977

Decided April 21, 1977

Arthur M. Wisehart, with whom *S. Chesterfield Oppenheim* was on the brief, for appellant. *Frederick L. Wood* also entered an appearance for appellant.

Edwin M. Zimmerman, with whom *William D. Iverson* was on the brief, for railroad appellees The Atchison, Topeka & Sante Fe Railway Company *et al.;* also argued on behalf of all other appellees.

Michael M. Maney, William Piel, Jr., and *Mark I. Fishman* were on the brief for appellee The Travelers Insurance Company.

Francis M. Shea, Richard T. Conway, and *John D. Aldock* were on the brief for appellees National Railway Labor Conference and Eastern Carriers Conference Committee.

Before BAZELON, *Chief Judge*, and WRIGHT and ROBB, *Circuit Judges*.

PER CURIAM: The background and facts relating to this case are adequately stated in the opinion of the District Court, *see REA Express, Inc. v. Travelers Ins. Co.*, 406 F.Supp. 1389 (D. D.C. 1976), so we shall not repeat them here. We agree with that opinion insofar as it holds that appellant's federal claims are foreclosed by *Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974). Consequently, we affirm that part of the District Court's judgment which dismissed those claims with prejudice.

The District Court also dismissed appellant's pendent state claims with prejudice on the basis that Delaware law would govern and that Delaware precedents conformed to the doctrine adopted in *Bangor Punta*. *See* 406 F.Supp. at 1394. However, the issues involved in this case are novel and the trial court found them "troubling." *Id.* at 1395. In these circumstances, the admonition of the Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), should have been followed:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Id. at 726 (footnotes omitted). Following *Gibbs*, we affirm the dismissal of appellant's state claims, but require their dismissal to be without prejudice.[1]

It is our view that the insurance claims[2] of former employees of appellant are not part of this litigation, so nothing herein or in the District Court's opinion should be read as affecting those claims. Nor are the claims of creditors of the bankrupt appellant before this court.[3] Consequently any claims they may have against appellees herein also remain unaffected by our judgment and the judgment of the District Court.

So ordered.

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[1] Appellant agrees that the state claims should be dismissed if we affirm the District Court's disposition of the federal claims. It only contests the dismissal with prejudice.

[2] *See* 406 F.Supp. at 1392 & 1395.

[3] *See id.* at 1395.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Memorandum and Order

In this action, REA Express, Inc. (REA) has sued Travelers Insurance Company [Travelers], twenty-two railroad companies [railroad defendants], the National Railway Labor Conference [NRLC], the Eastern Carriers' Conference [ECC], and the Eastern Carriers' Conference Committee [ECCC]. Counts I and II allege, respectively, violations of Section 10 of the Clayton Act, 15 U.S.C. § 20 (1970), and Section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). Counts III through IX allege common law causes of action based on breach of fiduciary duty, unjust enrichment, wrongful interference with business relations, and breach of contract. REA has moved for partial summary judgment with respect to the issue of defendants' liability under Section 1 of the Sherman Act for alleged price-fixing. The railroad defendants, the ECCC and the NRLC have jointly moved for summary judgment with respect to the entire case. Travelers has separately moved for complete summary judgment. Finally, ECCC and NRLC have moved for summary judgment with respect to Counts III through IX, the common law claims. The various motions now pending before the Court raise numerous issues with respect to the various defendants' liability. Those motions have been fully briefed and the Court has heard argument of counsel. The Court need not reach the merits of those issues, however, since one threshhold issue—REA's standing in equity to sue these defendants—is dispositive of REA's complaint.

Background

In January 1929, substantially all the railroads in the United States joined to form the Railway Express Agency, now REA Express, Inc., to conduct the railway express

business in this country. The railroads accomplished this result by purchasing all the assets of the sole express agency then operating, the American Railway Express Company, and transferring these assets to the newly formed REA. All of the capital stock in REA was sold to 85 participating railroads, and operating agreements were executed between REA and the railroads using the express service. These agreements provided that REA would be the exclusive express agency of the railroads and that annual revenues of REA, after deduction of operating expenses, would be distributed to the railroads executing the operating agreements in proportion to their express business. On February 11, 1929, the ICC approved in certain respects this arrangement. 150 ICC 423 (1929).

Until June 1968, all the capital stock in REA continued to be owned by the various railroads. Moreover, while the agreement for division of earnings had been modified or replaced between 1929 and 1968, the sole beneficiaries of REA's earnings were the railroads.

In June 1968, in order to prepare for sale of REA, the stockholding railroads deposited their stock in a voting trust. The voting trustees took over formal management of REA in June, and continued in such position until the sale of REA's stock on August 21, 1969. The stock was sold to the REA Holding Corporation, which was formed by a group of REA executive officers who had been employed by the voting trustees in 1968 and 1969. The Holding Corporation presently owns more than 99 per cent of the REA stock.

Disputed Transactions

Between 1929 and June 1968, the Board of Directors of REA consisted of officers or directors of various of the stockholding railroads. Although REA's complaint is framed in a number of different legal theories involving both federal and common law causes of action, at bottom

it is a typical suit seeking recovery for waste and mismanagement by the Board of Directors. REA challenges two transactions undertaken by the REA Board in 1956 and 1968. In 1956, the Board approved REA participation in GA 23000, then a health insurance policy written by Travelers and held by the railroads for the benefit of their employees. REA was directed to participate at a premium rate which was identical to the rate paid by all other participating railroads. REA claims that this uniform premium provision denied it the benefit of a higher experience rating [1] which it allegedly enjoyed. To force REA's participation in GA 23000 at this uniform premium rate, according to REA, constituted illegal price-fixing, waste, and mismanagement. Further, REA claims that the railroad defendants violated Section 10 of the Clayton Act by failing to require competitive bidding before awarding the insurance contract to Travelers.

In 1965, GA 23000 was amended to provide life insurance benefits. It is REA's contention that those benefits vested immediately in employees who were covered by the plan and later retired, a contention which Travelers and the railroad defendants disputed in 1968. Therefore, in March 1968, the railroads and REA, acting at the behest of the Board and through its agent, the ECCC, approved Amendment 16 to GA 23000, which provided that life insurance benefits did not vest in the retired employees, and that such benefits would lapse if any participant withdrew from the policy. Since certain REA officers had previously voiced their intention to seek REA's withdrawal from GA 23000, REA contends that this action constituted illegal monopolization by Travelers of the railroad insurance market, as well as waste and mismanagement by the REA Board.

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[1] An experience rating measures the safety record of employees over a period of time. REA claims that its employees enjoyed a better safety record than the employees of other railroads, which should have reduced the rates payable by REA.

REA withdrew from participation on March 31, 1968, except as to a small number of employees represented by the International Association of Machinists.[2] It claims that Amendment 16 has forced it to seek life insurance for its 4,000 retired employees to replace the allegedly vested benefits they enjoyed prior to approval of the amendment.

REA's Standing in Equity to Sue

With one exception to be addressed later, the factual posture of this case is almost identical to that in *Bangor Punta Operations* v. *Bangor & A.R. Co.*, 417 U.S. 703 (1974). There the Supreme Court held that the plaintiff had no standing in equity to sue, a result which this Court feels compelled to reach in this case as well.

In *Bangor Punta,* the following factual setting was presented. In 1964, Bangor Punta acquired through a subsidiary 98.3% of the stock of the Bangor and Aroostock Railroad. It thereafter controlled and directed the railroad until 1969, when it sold its entire stock interest to the Amoskeag Company. Then in 1971, the railroad filed suit against Bangor Punta and its predecessor in interest for mismanagement, misappropriation, and waste of the railroad's assets during the period of Bangor Punta's ownership of the railroad. Damages were also sought for violations of Section 10 of the Clayton Act and Section 10 of the Securities and Exchange Act.

Without analyzing the merits of any of the railroad's claims, the Court immediately framed the issue as Amoskeag's [3] standing in equity to sue Bangor Punta for vio-

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[2] REA finally withdrew as to these employees on June 1, 1972.

[3] Although the named plaintiff was the railroad, the Court stated that "Amoskeag, the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of respondent corporation which it owns and controls. 417 U.S. at 713.

lations of the Clayton Act and Securities and Exchange Act during Bangor Punta's term of ownership:

> The resolution of this issue depends upon the applicability of the settled principle of equity that a shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions.

417 U.S. at 710. Amoskeag could not point to any injury which it had suffered. All of the acts complained of had occurred during the term of Bangor Punta's ownership; there were no allegations that Amoskeag had been misled or defrauded in its purchase of the railroad or received less than the true value of its purchase; and there was no showing that the alleged wrongful acts had a continuing effect on the railroad or on the value of Amoskeag's stock. As the Court summarized, "In other words, Amoskeag seeks to recover for wrongs Bangor Punta did to *itself* as owner of the railroad." 417 U.S. at 712.

Based upon these facts, the Court found Amoskeag without standing in equity to sue. Since Amoskeag owned 98.3% of the railroad's stock, and would receive any recovery in the railroad's name, the Court further held that the railroad had no standing to sue. Particularly persuasive to the Court in reaching this decision was the realization that Amoskeag, if it were to recover, would have purchased the railroad at its fair value and in addition would have received a windfall for injuries which presumably were reflected in the purchase price. 417 U.S. at 712, 716.

The Court of Appeals had upheld Amoskeag's standing to sue in the name of the railroad. It focused on the benefit which would accrue to the public from enforcement of the antitrust and securities laws. The Supreme Court expressly rejected this as a consideration which could overcome equity's aversion to unjust enrichment. The Court stated in footnote 13:

> The dissent argues that respondents' complaint is based on federal antitrust and securities statutes and that such laws are designed in part to benefit the public. With that much we agree. But the statutory design has not been effectuated through the indiscriminate provision of causes of action to every citizen. Rather, these statutes create specifically defined legal duties to particular plaintiffs and vest the appropriate causes of action in them alone. Here the statutorily designated plaintiffs are respondent corporations. But as we have stated, these plaintiffs cannot maintain the present action because a recovery by Amoskeag would violate the established principles of equity.

417 U.S. at 716-17 n.13. The clear thrust of the Court's opinion is that the unjust enrichment which would benefit Amoskeag precludes it—or its wholly-owned subsidiary—from recovering, regardless of the public interest involved.

The Court further found that the equitable principle which precluded Amoskeag's recovery based on the federal causes of action likewise precluded recovery on the common law causes of action, since Maine recognized the validity of that principle. 417-U.S. at 714.

REA's situation is identical to that of the railroad in *Bangor Punta,* with one exception that will be addressed later. The REA Holding Corporation owns, as did Amoskeag, over 98% of REA's stock, which it had purchased from the defendant railroads in 1969. REA has alleged no fraud or deceit in the sale to the Holding Corporation. Indeed, the Holding Corporation was the corporate instrumentality for the new management group which entered the REA structure when the railroads established the voting trust to sell REA, and REA does not dispute that the group knew as well as anyone the value of REA. More-

over, the two acts complained of, the uniform premium provision of the 1956 insurance contract and the alleged divesting of retired employee life insurance benefits embodied in Amendment 16, were inflicted by the railroads on their wholly owned subsidiary REA during their ownership of REA. If these transactions harmed anyone, they harmed the railroads. The allegedly higher premiums would ultimately affect the income of the railroads as stockholders, and the railroads would have been required to maintain the Travelers policy after Amendment 16 if they wished to continue their retired employees' life insurance benefits.

That the railroad defendants anticipated selling REA when Amendment 16 was adopted is immaterial since the Holding Company through the new management group had full knowledge of both transactions, as well as the effect on REA. There are no allegations that this effect was not a factor in the purchase price, or that the railroad defendants failed to disclose the transactions; hence the Court must assume that the purchase price reflected REA's true value. To allow the Holding Corporation, through REA, to recover, would permit the Holding Corporation to purchase REA for its true value and then receive additional "compensation" for damage to REA which was previously reflected in the purchase price. Such a result is clearly condemned by the *Bangor Punta* Court:

> The equitable principles of *Home Fire* preclude Amoskeag from reaping a windfall by enhancing the value of its bargain to the extent of the entire purchase price plus an additional $2,000,000. Amoskeag would in effect have acquired a railroad worth $12,000,000 for only $5,000,000. Neither the federal antitrust or securities laws nor the applicable state laws contemplate recovery by Amoskeag in these circumstances.

417 U.S. at 716.

Delaware law applies to REA's common law claims asserted in Counts III through IX of its complaint, since it is the state of REA's incorporation. See *Weiss* v. *Kay Jewelry Stores, Inc.*, 152 U.S. App. D.C. 350, 359, 470 F.2d 1259, 1268 (1972). Delaware recognizes the same equitable principle articulated in *Bangor Punta*. See *Goodman* v. *Futrovsky*, 42 Del. Ch. 468, 213 A.2d 899, 903 (Sup. Ct. 1965). Therefore, REA's common law claims cannot be maintained for the reasons stated above. See 417 U.S. at 713-14.

REA attempts to escape the *Bangor Punta* doctrine in several ways. First, REA claims that *Bangor Punta* is inapplicable to this case because it involves allegations of price-fixing, which are *per se* violations of the antitrust laws. While a *per se* violation of the antitrust laws was not involved in *Bangor Punta*, the Court's clear emphasis on equity's aversion to unjust enrichment as the basis for its holding renders irrelevant the nature of the antitrust violation. Second, REA attempts to apply the intra-enterprise conspiracy doctrine of antitrust law to this case. That doctrine holds that an agreement between a parent corporation and its subsidiary can constitute a combination or conspiracy under the antitrust laws. See *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86, 116-117 (1975). Even assuming that a Sherman Act or Clayton Act violation could be established by REA through the use of the intra-enterprise conspiracy doctrine, however, the equitable principle established by the *Bangor Punta* Court would preclude recovery by REA. 417 U.S. at 716-17 n.13. The court was not concerned with the nature or method of the antitrust violation; it was the unjust enrichment of Amoskeag (here, REA Holding Corporation) which denied the railroad (here, REA) standing in equity to sue. Thus, applicability of the intra-enterprise conspiracy doctrine is irrelevant. Third, REA argues that since in the instant case several railroads, rather than

one parent corporation as in *Bangor Punta,* inflicted the injury on the subsidiary, *Bangor Punta* is inapposite. As noted earlier, the Court's rationale is avoidance of unjust enrichment; it did not focus on the defendant's conduct or corporate structure. Whether there be one or several parent corporations is simply irrelevant to the *Bangor Punta* doctrine.

Fourth, REA attempts to distinguish *Bangor Punta* by proffering a "continuing wrong" exception. In *Bangor Punta,* the Court noted, "Nor does it appear that the alleged acts of prior mismanagement have had any continuing effect on the corporations involved or the value of their shares." 417 U.S. at 711. The Court did not elaborate on this apparent exception to the rule it enunciated, and the railroad defendants argue that the exception does not and should not exist since it would "swallow the rule." See also *Bangor & Aroostook R. Co.* v. *Bangor Punta Operations, Inc.,* 353 F. Supp. 724, 727 n.1 (D. Maine 1972). Whether the exception is indeed valid need not be decided since there are no facts to support its application. If there is any continuing injury, it has flowed from Amendment 16, which forced REA to continue paying the allegedly higher premiums or lose all life insurance benefits for its retired employees. If REA has had to pay higher premiums to reestablish these benefits after its withdrawal from the policy on March 30, 1968, it is not alleged anywhere that the purchase price—agreed to August 20, 1969—did not reflect this increased liability. In short, any wrong inflicted by the railroad defendants through Amendment 16 was known to the Holding Corporation and should have been reflected in a lower purchase price. The railroad defendants were injured thereby, not the Holding Company.

Fifth, and perhaps most troubling, REA argues that the interests of the REA employees and creditors make *Bangor Punta* inapplicable. The caption of the complaint asserts that REA sues in its own capacity and on behalf of its employees. Moreover, REA was adjudicated a bankrupt on November 6, 1975, so that any recovery in this lawsuit would first inure to the benefit of the estate, and be distributed ultimately to the creditors of REA.

Even if REA had not been adjudicated bankrupt, the remote interest of the employees in any recovery would not justify excepting REA from application of the *Bangor Punta* doctrine. A similar argument was made in *Bangor Punta* that Amoskeag could use its recovery to benefit the public. The Court rejected this argument as a basis for granting Amoskeag standing to sue because "there is no assurance that the public would receive any benefit at all from these funds." 417 U.S. at 715. Similarly here, there is no assurance, whether bankrupt or not, that REA would use its recovery to benefits its employees."[4]

Nor can the more immediate interests of the creditors justify REA's exemption from the *Bangor Punta* doctrine. To be sure, the Supreme Court observed in a footnote, in response to an argument by Justice Marshall in dissent, that the railroad had not brought the action on behalf of creditors, and that the financial health of the railroad was "excellent." 417 U.S. at 718 n.15. The extent and importance of this observation is unclear and undeveloped. It is this Court's opinion, however, that an exception to *Bangor Punta* should not be made on the facts of the case presented.

First, this suit is not brought on behalf of creditors. It is only because of REA's recent bankruptcy that the creditors now pose a prominent interest. Surely, if the pending motions had been argued and decided prior to November

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[4] Although REA asserts that it has "implicit authorization" from the unions representing employees to sue on behalf of the employees, there is no binding agreement that REA use the money it would recover for the benefit of the employees.

6, 1975, the date of the bankruptcy, there would be no question that *Bangor Punta* would require dismissal of this action. The illogic of allowing REA to recover now only serves to underscore the artificiality of an exception to *Bangor Punta* which would permit a corporation to recover only if it became bankrupt during the pendency of the proceeding. It cannot be gainsaid that the creditors would benefit from a recovery by REA; but the creditors of Amoskeag in *Bangor Punta* would also have benefitted, their position being strengthened by the increased financial stability of Amoskeag. Moreover, counsel for REA at oral argument did not know of any instance of a creditor (other than the railroad defendants) who had a debt outstanding prior to the change of ownership in 1969. Since that time, any creditor would have or should have been fully apprised of the financial condition of REA. To that extent, the creditors in the instant case stand in the same shoes as the Holding Corporation which purchased REA, and Amoskeag in Bangor Punta.[5] Both the post-1969 creditors and the Holding Corporation had knowledge of the financial condition of REA when entering into their respective transactions, and to allow them to now recover more than the value of the bargain they freely entered would clearly constitute unjust enrichment.

In short, REA has not shown any injury which accrued to anyone but the railroad defendants. To allow REA, the Holding Corporation, or REA's creditors, to recover for wrongs inflicted by the defendants on themselves, would

[5] Pre-1969 creditors, to the extent that they had been wronged by actions of the REA board after entering into the credit arrangement with REA, might have a stronger interest if they were before this court. Whether a recovery would be appropriate even in that instance need not now be decided, since, as noted earlier, this is not a creditors' suit, and no pre-1969 creditors other than the railroad defendants have any interest in REA's assets.

clearly be unjust enrichment and cannot be permitted under the doctrine of *Bangor Punta*.[6]

In light of the foregoing, it is this 2d day of February, 1976

ORDERED that the motions of Travelers, the railroad defendants, the NRLC, and the ECCC for summary judgment be and the same hereby are granted; and it is

FURTHER ORDERED that plaintiff's complaint be and the same hereby is dismissed with prejudice.

/s/ WILLIAM B. JONES
Chief Judge.

[6] Travelers and the conference defendants, of course, cannot be held liable, either, since the basis of *Bangor Punta* is avoidance of unjust enrichment, not deterrence of allegedly illegal or improper conduct. See 417 U.S. at 717.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-112

REA EXPRESS, INC., *Petitioner,*

v.

THE TRAVELERS INSURANCE COMPANY, et al,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF RAILROAD RESPONDENTS AND RESPONDENTS THE NATIONAL RAILWAY LABOR CONFERENCE AND THE EASTERN CARRIERS' CONFERENCE COMMITTEE

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This brief in opposition to the petition for a writ of certiorari filed by REA Express, Inc. to review the judgment affirming dismissal of plaintiff-petitioner's Complaint is filed on behalf of the railroad defendants-respondents identified in Attachment A and the defendants-respondents National Railway Labor Conference and Eastern Carriers' Conference Committee.

QUESTION PRESENTED

Whether the Court of Appeals and the District Court correctly concluded that the new owners of a company are barred by *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), from causing the company to bring suit against its former own-

ers and others attacking conduct alleged to have injured the company during the period it was a wholly-owned subsidiary of the former owners.

STATEMENT OF THE CASE

In 1928 and 1929 eighty-five of the nation's railroads organized the Railway Express Agency, Inc., later renamed REA Express, Inc. ("REA"), as a jointly-owned, non-profit facility to engage in the express transportation of goods as an agent for its railroad owners. Railroad ownership and control of REA were approved by the Interstate Commerce Commission under Section 5(2) of the Interstate Commerce Act. *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I.C.C. 423 (1929). This relationship whereby REA was wholly owned by the railroads, implemented and administered under the supervision of the Interstate Commerce Commission, continued until the large majority of the railroad shareholders created a voting trust in June 1968 to facilitate a sale of the company, which had resulted in substantial losses to the railroads for a number of years.[1] The trustees of the voting trust brought in a new management team for REA in 1968 and early 1969, and in 1969 the new management group offered to buy the company through a corporate intermediary, the REA Holding Corporation, which they would form and control. A large majority of the railroad shareholders accepted immediately, and the sale was consummated in August 1969. Certain other railroad-owned shares were transferred to the Holding Corporation created by the new REA

[1] The history of the creation of REA and of the railroads' relationship to it over the years is reviewed in detail in *Railway Express Agency, Inc., Notes*, 348 I.C.C. 157 (1975).

management to hold formal title to the company during the following months. As a result of these transactions, the Holding Corporation acquired more than 99 percent of the REA stock for a price of slightly more than $2 million and certain warrants to purchase Holding Corporation stock, none of which was ever exercised.

More than two years later, in October 1971 the new owner of REA caused the company to bring this action seeking damages under a variety of federal antitrust and common law theories for injuries REA allegedly suffered between 1956 and March 1968 as a consequence of its participation in a group health and life insurance policy maintained pursuant to collective bargaining agreements for employees of the railroad industry. The Complaint, which was amended in insignificant respects in April 1972, named as defendants some but not all of the railroads which formerly owned all the stock of REA;[2] the National Railway Labor Conference and Eastern Carriers' Conference Committee, which acted as representatives for both REA and the railroads in administering the insurance policy; and The Travelers Insurance Company ("Travelers"), which was the insurer for the policy.

The most important aspect of this lawsuit for present purposes is that REA was a wholly-owned subsidiary of the railroads during the entire period in question. While the Complaint was brought in the name of REA, at the time suit was filed REA was owned by a new stockholder that had no interest whatever in the

[2] REA has never explained why some but not all of its former shareholders were named as defendants; venue or service of process considerations seem to explain the selection, however.

company at the time of the events complained of. The Complaint sought treble damages exceeding $75 million, and had the new owner prevailed it would have recovered a large multiple of its $2 million purchase price, in addition to keeping the company.[3]

The events on which the suit is based are as follows. A multi-employer collective bargaining agreement between the railroads and various unions representing their employees provided that certain group insurance benefits would be afforded to those employees during the term of the agreement. In fulfillment of that agreement, a single policy providing those benefits was obtained in 1955 from Travelers. From time to time thereafter, new collective bargaining agreements extended (and sometimes expanded) the obligation of the employers to provide group health and life insurance

[3] This lawsuit, moreover, represented only a small part of the riches that the new owners of REA have sought to reap from its former railroad shareholders. REA filed two other lawsuits against the same and other railroads in the Eastern District of Pennsylvania ("the Philadelphia action") and the Southern District of New York ("the New York action") seeking to recover well over $500 million in damages for the most part upon the basis of conduct of the prior owners during the time they owned REA. *See* REA Express, Inc. v. Aberdeen & Rockfish R.R., 412 F. Supp. 1239 (E.D. Pa. 1976); REA Express, Inc. v. The Alabama Great Southern R.R., 427 F. Supp. 1157 (S.D.N.Y. 1976). A partial summary judgment has been rendered in favor of the defendants in the Philadelphia action based upon the *Bangor Punta* doctrine as well as a number of other grounds. *See* 412 F. Supp. 1239 (E.D. Pa. 1976). The New York Court, per Judge Friendly, dismissed the New York suit for failing to state a claim upon which relief could be granted. 427 F. Supp. 1157. In addition, the New York Court affirmed a decision of the ICC adverse to REA that had been rendered in a related proceeding, and this has been summarily affirmed by this Court. *See* Railway Express Agency, Inc. Notes, 348 I.C.C. 157 (1975), 427 F. Supp. 1157 (1976), *aff'd*, —— U.S. —— (1977).

benefits for the represented employees, during the terms of the new agreements, and the insurance policy was revised and renewed for additional terms in accordance with those agreements.

REA became a participating employer in that insurance policy, at its request, pursuant to collective bargaining agreements made with certain of the participating unions, in 1956. As required by subsequent collective bargaining agreements, its participation continued, insofar as relevant here, until its withdrawal effective March 31, 1968 with respect to its employees represented by the Brotherhood of Railway and Airline Clerks, Freight Handlers, Express and Station Employees. In order to fulfill its collective bargaining agreement with that union, REA obtained a separate policy from Travelers providing identical benefits for those employees.

The theory of the Complaint, asserted under a number of antitrust and common law theories, in essence is that REA had been forced to pay excessive premiums during the period of its participation in the industrywide insurance policy in question, and that it had been stripped of a valuable asset—the supposed vesting of life insurance benefits which it was required by collective bargaining agreement to provide for certain of its retired employees—at the time of its partial withdrawal from the policy in March 1968. In fact, REA had paid exactly the same insurance premiums for each employee as each of its railroad owners had paid for its employees under the policy since, in accordance with the multi-employer collective bargaining agreement, the industrywide policy had at all times explicitly provided for uniform premiums payable by all participating employers. There was also scant basis for

believing that the policy was ever intended to provide for any "vested" life insurance benefits for retired employees. That point is immaterial here, but it is undisputed that the policy in all other respects provided for only "term," pay-as-you-go benefits during the period of an employer's participation, and the structure and background of the provisions in question compellingly indicate that that was the situation as to benefits for retired employees as well. A clarifying amendment to the policy in March 1968 confirmed that all coverage was on a "term," pay-as-you-go basis.

The Complaint sought recovery under Section 10 of the Clayton Act, 15 U.S.C. § 20, apparently on the theory that REA somehow purchased insurance from its railroad owners with whom it shared interlocking directors without competitive bidding. However, the railroad defendants were, like REA, purchasers not sellers of insurance; it is undisputed that REA had no interlocking directors with defendant-respondent Travelers, the seller of insurance coverage in this case.[4] REA also alleged that the defendants-respondents violated Sections 1 and 2 of the Sherman Act by somehow fixing the price of its insurance premiums and monopolizing and attempting to monopolize the business of insurance. This claim of price-fixing, upon which the petition focuses as the basis for distinguishing *Bangor Punta,* seemingly is based on the proposition that the

[4] In the New York action, REA had challenged a note transaction between REA and all its railroad shareholders for failure to employ competitive bidding. The court in that case, per Judge Friendly, ruled that Section 10 was not intended to reach such a transaction between a carrier and all the owners, and, on appeal, this Court affirmed. 427 F. Supp. 1157 (S.D. N.Y. 1976), *aff'd* —— U.S. —— (1977). Hence even if REA were somehow to be regarded as a purchaser of insurance from the railroads, its Section 10 claim is non-existent.

railroad owners of REA agreed with the insurance company on the premiums REA paid for insurance and, through their control of REA's board and management, required REA to participate in the policy. According to the petition, a Sherman Act combination "was involved each time the railroad-interlocking Board of Directors took action." (Petition at 15) A variety of common law theories, not involved in this petition, were also alleged.

After liberal discovery, the parties filed cross-motions for summary judgment and partial summary judgment in February 1975. Initially, the defendant railroads relied simply upon this Court's recent decision in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.,* 417 U.S. 703 (1974); at the direction of the trial judge, their motion was enlarged to set forth all their grounds for summary relief. Defendant Travelers filed a similar motion at that time.

After extensive briefing of the issues and oral argument, the District Court (per Jones, J.) granted the defendants-respondents' motions for summary judgment on February 2, 1976, on the basis of the *Bangor Punta* doctrine. In doing so, the trial judge considered and rejected all the arguments which REA attempts to raise here. The District Court did not find it necessary to reach any of the defendants' other grounds for summary relief, including the failure of the Complaint to state a substantive antitrust cause of action, the bar of the statute of limitations, the preemptive effect of the ICC's pervasive regulatory jurisdiction over the conduct complained of, and the applicability of the labor exemption to the antitrust trust laws.

The Court of Appeals affirmed in a unanimous per curiam decision. It held that REA's federal claims "are

foreclosed by *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R. Co.*, 417 U.S. 703 (1974)." The Court of Appeals also affirmed the dismissal of REA's common law claims, but modified the judgment of the District Court to provide that such dismissal should be without prejudice. REA does not pursue the issue of its common law claims in this petition. The Court of Appeals noted that neither the insurance claims of former employees nor the claims of creditors were part of this litigation.

REASONS FOR DENIAL OF THE WRIT

The decisions below are in full accord with the established principles of law recognized by this Court in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), do not conflict with this Court's recent decision in *Illinois Brick Co.* v. *Illinois*, 45 U.S.L.W. 4611 (1977), and present no appropriate occasion for the exercise of this Court's jurisdiction.

1. *Bangor Punta* Is Directly Applicable To And Controls This Case.

REA understandably slights the remarkable similarities between *Bangor Punta* and this case. There, as here, a new owner had acquired virtually all the stock of the plaintiff corporation after the events in question. There, as here, the new owner caused the plaintiff to bring suit under Section 10 of the Clayton Act and various common law theories for alleged instances of, in effect, waste and mismanagement. Damages substantially in excess of the purchase price paid by the new owner were also sought in *Bangor Punta*, though hardly of the magnitude of the premium sought here.

Faced with these facts and the prospect of a windfall recovery for the new owner, this Court held in *Bangor*

Punta that as an initial matter the new owner of the plaintiff corporation would have been barred from bringing suit by "the settled principle of equity that a shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions." 417 U.S. at 710. The Court amplified this holding by noting that this principle has "special force where a shareholder purchases all or substantially all the shares of a corporation from a vendor at a fair market price" and then seeks to sue the former owner or owners for prior misconduct. *Id.* at 710 n. 5. Having concluded that the new owner of the plaintiff corporation could not itself have brought suit, this Court went on to hold that it would elevate form over substance to allow the new owner to achieve the same result by causing its newly-acquired company to initiate suit against the former owners. *Id.* at 713.

As both the Court of Appeals and District Court below concluded, these holdings are precisely applicable here. REA's determined efforts to outflank *Bangor Punta*, rejected by the courts below after thorough briefing and full argument, do not merit further consideration by this Court.

As far as the supposed interests of REA's creditors are concerned (*see* Petition at 8-9), REA, which had a profit in 1974, did not enter reorganization proceedings until 1975, more than three years after the filing of its Complaint, more than five years after the transfer of ownership and almost seven years after the last act of alleged wrongdoing.[5] The Complaint, not surpris-

[5] REA entered a reorganization proceeding under Chapter XI of the Bankruptcy Act in February 1975 and was adjudicated a bankrupt in November 1975. The last act of alleged wrongdoing

ingly, makes no attempt to plead a cause of action on behalf of creditors, and the extended period of discovery in this action correspondingly did not deal with any such issues—REA neither propounded discovery to substantiate such claims, nor did defendants have any occasion to embark upon discovery to refute any such never-advanced theories.[6] Accordingly, the District Court was correct in concluding that "this suit is not brought on behalf of creditors" (Petition, App. C at 17a), a conclusion correctly affirmed by the Court of Appeals (Petition, App. B. at 7a). To the extent creditors of REA might conceivably have some claim against the defendants-respondents, whose relationship with REA ended almost seven years previous to its bankruptcy, the Court of Appeals out of an abundance of caution indicated that such claims, if any, were not before the Court and were not being ruled upon. There is therefore no basis for this Court's intervention on this ground.

REA next notes that the plaintiff in *Bangor Punta* did not "contend that the purchase transaction was tainted by fraud or deceit," 417 U.S. at 710, and attempts to argue that this case is somehow different in

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complained of occurred in March 1968; the transfer of REA to its new owner was consummated in August 1969; and the Complaint was filed in October 1971.

[6] The Complaint did purport to be brought, as to at least one antitrust claim and several common law theories, on behalf of certain of REA's former employees. But these employees, even if they might somehow be regarded as creditors of the bankrupt REA today—a position which REA asserts as an *ipse dixit* with no evidentiary support or legal citation—they clearly were not such when the suit was commenced, nor for many years thereafter.

that respect (Petition at 10-11). Even REA is forced to concede, however, that the word "fraud" was not used in the Complaint (Petition at 10). Moreover, REA never contended or sought to establish below that "the purchase transaction was tainted by fraud or deceit," and an analysis of its present argument demonstrates that it does not in fact make such a contention here. It is the circumstances which allegedly gave rise to its causes of action, all of which occurred prior to March 31, 1968, which are now said to be the equivalent of "fraud" (Petition at 10-11), rather than the circumstances of the "purchase transaction." As noted in our Statement of the Case, REA was purchased by a holding company whose stockholders were officers of REA, and there is no evidence or claim that they were misled by the sellers in any way in regard to what they were buying.

The presence of defendants-respondents who were not former shareholders of REA also cannot deflect the force of *Bangor Punta,* and REA's attempts to invoke this fortuitous circumstance is unavailing (Petition at 11-12). Even if third parties participated in the conduct complained of by the former railroad owners of REA, the events in question nevertheless occurred at a time when REA was the wholly-owned subsidiary of the railroads named as defendants. As in *Bangor Punta,* this is a case where the prior owners are alleged to have participated in conduct which occurred before the transfer of ownership to the new owner, and which therefore injured only themselves. There is nothing in the reasoning of *Bangor Punta* to suggest that the presence of third parties should make any dif-

ference, and REA cites no authority in support of its argument.[7]

REA's attempt to resurrect a distinction between legal and equitable causes of action (Petition at 12-13) is no more than frivolous. *Bangor Punta* involved antitrust claims just as this case does, as REA is forced to acknowledge, *see* 417 U.S. at 706, 710. Whatever the basis for a distinction between legal and equitable causes of action when *Home Fire Ins. Co.* v. *Barber,* 67 Neb. 644, 93 N.W. 1024 (1903), was decided, any such basis for distinction has been eliminated by the merger of law and equity, as recognized by this Court and other Courts in applying the *Home Fire* doctrine without regard to whether alleged wrongs historically sounded in law or equity.[8]

The very argument raised by the petition as the keystone of its contentions—that equitable principles

[7] In deciding whether to dismiss charges of corporate mismanagement against insiders, courts have not in the past distinguished between circumstances where third parties were or were not involved. *See, e.g.,* Bloodworth v. Bloodworth, 225 Ga. 379, 169 S.E.2d 150 (1969) (dismissing derivative suit despite presence of third-party outsider as defendant) (cited in *Bargor Punta,* 417 U.S. at 710); Amabile v. Lerner, 166 A.2d 603 (N.J. Ch. 1960) (derivative suit dismissed although outside corporations profited from alleged wrongs by insiders); Myer v. Myer, 271 App. Div. 465, 66 N.Y.S.2d 83 (App. Div. 1946) (same).

[8] *See, e.g.,* Ford Tank Maintenance Co. v. Ford, 24 Misc. 2d 261, 203 N.Y.S.2d 542 (1960) (action for wrongful coversion); Capitol Wine & Spirit Corp. v. Pokrass, 277 App. Div. 184, 98 N.Y.S.2d 291 (1950), *aff'd,* 302 N.Y. 734, 98 N.E.2d 704 (1951) (action for misappropriation and waste); First State Bank v. Morton, 146 Ky. 287, 142 S.W. 694 (1912) (action alleging negligence by former corporate officer); Park Terrace, Inc. v. Burge, 249 N.C. 308, 106 S.E.2d 478 (1959); Molina v. Sovereign Camp, W.O.W., 6 F.R.D. 385, 399-401 (D. Neb. 1947).

should not debar the pursuit of antitrust claims—was explicitly raised and rejected by this Court in the *Bangor Punta* decision. 417 U.S. at 717 n. 13. And petitioner's claim that it is alleging a "classic" price-fixing offense (Petition at 7) contrasts sharply with the murkiness of the actual theory alleged (Petition at 4, 15)—*i.e.,* that the owners of an entity combine or conspire each time they act uniformly with regard to this entity.[9]

Finally, REA has neither alleged nor proven any facts requiring this Court to decide whether there should be a "continuing wrong" exception to the *Bangor Punta* doctrine (Petition at 14-15). All of the defendants-respondents' conduct of which REA complains occurred prior to the time the railroads sold their stock and the new owner took control. If REA paid excessive premiums or was deprived of the benefit of vested coverage for certain former employees, the deprivation took place well before the transfer of ownership. As the District Court observed, the new owners, as inside management, necessarily had knowledge of the transaction prior to determining their purchase price. If *Bangor Punta* is to have any effect, it must certainly prevent the new owners of a corporation from bringing suit on the rationale that a "continuing wrong" exists as long as any assets im-

[9] In the New York action, REA advanced a similar theory when it claimed a conspiracy to exist by reason of the owning railroads' agreement with REA and each other on interest rates to be paid by REA. The New York court, per Judge Friendly, stated that the contention "borders on the frivolous" and flatly rejected it. *See* 427 F. Supp. at 1166. Nor is petitioner's cause advanced by its belated and inarticulate efforts to suggest (Petition at 4), that somehow reinsurers were involved in "extending" the effect of the conspiracy.

properly taken are not returned. Any contrary result would represent not an exception to but a wholesale repudiation of this Court's decision in *Bangor Punta.*

2. The Issue Involved In *Illinois Brick* Had Nothing Whatever To Do With This Case.

Obviously perceiving the absence of any adequate basis to distinguish *Bangor Punta,* REA attempts to argue that this Court's recent decision in *Illinois Brick Co.* v. *Illinois,* 45 U.S.L.W. 4611 (1977), somehow justifies review of the decision below. REA never suggests any intelligible basis for such a claim, however. There is nothing whatever in the decisions in *Illinois Brick* to suggest a repudiation of the well established equitable principles recognized by the Court in *Bangor Punta,* principles which clearly bar REA from pursuing this action on its own behalf. To the extent that *Illinois Brick* might have any potential applicability whatever to those case, it would only stand as an additional barrier to any assertion of indirect claims by REA's creditors, in the event—contrary to the explicit findings of both courts below—that such claims were properly asserted and before the Court.

3. REA Has Suggested No Reason Why Summary Relief Was Inappropriate.

REA makes the predictable ritual incantations of the recognized doctrine that summary relief should be sparingly granted in antitrust actions where issues of motive and intent are controlling. It suggests no fact material to the decisions of the court below which was or is disputed, however. The facts demonstrating the applicability of *Bangor Punta* to this case are entirely undisputed. And in rejecting REA's efforts to invoke

supposed creditor interests to avoid the reach of *Bangor Punta,* the Court of Appeals and District Court did not improperly resolve any disputed factual issue, but rather correctly held that no such issues had been raised by the Complaint or otherwise placed before the courts below.

4. There Is No Basis For Granting The Petition For A Writ Of Certiorari.

There are no grounds for the issuance of a writ. The decision below is not in conflict with the decision of any other federal court, nor is there any suggestion of such conflict. As shown above, there is no basis for believing that the decision is in conflict with prior decisions of this Court or that there has been a complete departure below "from the accepted and usual course of judicial proceedings." Rules of the Supreme Court, Rule 19(1)(b).

Moreover, the circumstances of this case are highly atypical, involving transactions between a jointly-owned agency and all its owners, where the challenged interlocking relationship between the agency and its owners had been reviewed and approved by the Interstate Commerce Commission, and where the suit was brought solely because REA was thereafter sold to new owners. The issues presented for review are sui generis and there are thus no "special and important reasons" requiring review of this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTACHMENT A

Railroad Respondents

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore & Ohio Railroad Company
Burlington Northern, Inc.
The Chesapeake & Ohio Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Northern Western Railway Company
Denver & Rio Grande Western Railroad Co.
Gulf, Mobile & Ohio Railway Company
Illinois Central Railroad Company
Louisville & Nashville Railroad Company
Missouri Pacific Railroad Company
Norfolk and Western Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis-San Francisco Railway Company
St. Louis Southeastern Railway Company
Seaboard Coast Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
The Texas & Pacific Railway Company
Union Pacific Railroad Company
Western Pacific Railroad Company

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BRIEF OF RESPONDENT THE TRAVELERS INSURANCE COMPANY IN OPPOSITION

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BRIEF OF RESPONDENT THE TRAVELERS INSURANCE COMPANY IN OPPOSITION

Respondent The Travelers Insurance Company ("Travelers") submits this brief in opposition to the petition by REA Express, Inc. ("REA") to review the decision of the Court of Appeals for the District of Columbia Circuit affirming the dismissal of this action by Chief Judge Jones in the District Court. The dismissal was based upon the decision of this Court in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974). The complaint

in the District Court was predicated upon a claim of a conspiracy, in violation of federal antitrust laws, by the former owners of REA, Travelers and various unknown others to deprive REA of insurance benefits allegedly vested with employees of that company as the result of collective bargaining agreements. The alleged conspiracy resulted, according to the complaint, in forcing REA to pay higher premiums for insurance than it might otherwise have obtained and of forcing REA to accept an amendment to the life insurance policy covering retired employees to the detriment of REA. All of the alleged acts of conspiracy occurred during the time that the railroad defendants were the owners of REA and such acts were known to the new owners of REA at the time of their subsequent purchase of that corporation.

QUESTION PRESENTED

Does the applicability of the *Bangor Punta* decision to the particular and unique facts of this case, in a suit not brought on behalf of creditors or employees, deserve review by this Court under the standards set forth in Rule 19 of this Court.

STATEMENT OF THE CASE

Travelers, during 1954, successfully competed to become the primary underwriter of a group accident and health insurance policy, designated "GA 23000", for numerous railroads and railroad-related companies which had undertaken in accordance with a collective

bargaining agreement to provide prescribed uniform benefits, at uniform premium rates, for certain of their unionized employees. As a result of a subsequent collective bargaining agreement between the railroads and labor unions representing their employees, GA 23000 was amended in 1961 to provide term life insurance benefits for active employees of the railroads. In 1965 it was amended again to provide term life insurance benefits for retired employees. Because of the enormous number of employees being covered by the policy and the novel structure of the policy at its outset, a substantial portion of the total policy was reinsured by Travelers with other insurance companies on a participation basis.[1]

REA, then known as Railroad Express Agency, Inc., was not a party to GA 23000 at its inception but joined the existing policy in 1956 after REA became bound by a collective bargaining agreement to provide insurance benefits to those of its employees who were represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. As a party to the contract REA was represented by a joint policy holder committee, consisting of representatives of employers and labor unions, with respect to all substantive questions concerning the administration of GA 23000.

In 1968 Travelers and the joint policyholder committee negotiated an amendment to GA 23000 which

[1] Travelers is the only insurance company which is a party to this litigation.

REA contends had the effect of depriving REA and some of its retired employees of benefits which had already vested under the policy. REA, however, does not contend that Travelers in any way deceived the joint policyholder committee with respect to the negotiation and adoption of the amendment. Rather, REA contends that its previous owners (*i.e.*, the railroads and their representatives) for some reason conspired with Travelers to adopt the amendment to the detriment of REA.[2] Later in 1968 the railroads which owned REA placed their shares in a voting trust and, a year later, REA's shares were purchased by new owners, who had been serving as interim management of REA under the voting trust.

Some three years later the new owners caused REA to initiate this action even though they did not own shares of REA at the time of the alleged wrongs and any recovery would have been a "windfall" to them. None of the acts complained of by REA were alleged to have been undertaken by Travelers alone, without the participation of, or agreement with, the railroads who were REA's prior owners and who were the persons from whom REA's new owners had purchased their shares.

[2] REA, despite its ostensible protestations about the amendment, accepted a credit of more than $2 million from the Special Account which Travelers maintained in connection with GA 23000 and remained a party to GA 23000 for four years beyond the adoption of the amendment and almost three years beyond REA's sale to its new owners who, during that period, brought this action.

Following the decision by this Court in *Bangor Punta Operatoins, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974), all of the defendants moved for summary judgment on the grounds that (1) recovery by REA's new owners for wrongs allegedly committed against REA prior to its sale, by its previous owners and Travelers, acting in concert with the previous owners, would constitute unjust enrichment to REA's new owners since they had purchased their shares with full knowledge of the matters complained of and at a price presumably reflecting those matters, (2) that any wrongs committed by, or with the participation or acquiescense of, REA's previous owners injured only the previous owners themselves, and (3) that REA's new owners had suffered no injury because they owned no stock in REA at the time of the alleged wrongs.

REASONS FOR DENYING THE PETITION

1. While REA argues at length the merits of its alleged causes of action, such argument is not responsive to the sole issue before this Court. REA's arguments on the merits were thoroughly refuted in the papers submitted by defendants to the District Court. The only issue which should appropriately be addressed to this Court is the applicability of *Bangor Punta* to the unique facts of this case, clearly not an issue of federal law which should be decided by this Court.

The essence of the *Bangor Punta* decision was this Court's recognition that, when the new owners of a

corporation purchase their shares for a price which presumably reflects whatever harm might previously have been done by the corporation's previous owners and those acting in concert with them, the new owners have not been injured by the past harm done to the corporation; any recovery, directly or indirectly, by the new owners would therefore constitute a "windfall" or unjust enrichment to them in violation of the "contemporaneous ownership" doctrine. 417 U.S. at 713, 716. *See* F.R. Civ. P. 23.1(1).

A striking example of the potential for unjust enrichment of a corporation's new owners is the prayer for damages in this very case, which consists of specified damages of close to $100 million (including trebling) as well as various unspecified amounts, as compared to the price of approximately $2 million which REA's new owners paid the railroads for ownership of the company. It is contrary to common sense to assume that a $100 million cause of action can be purchased for $2 million. *See In re REA Express, Inc.*, 412 F. Supp. 1239, at 1252 (E.D. Pa. 1976), where REA's new owners sought damages in excess of $345 million, including trebling, for harm done to REA prior to the new owners' $2 million purchase of the corporation's shares. Those claims in that case which were at all similar or analogous to the claims here were similarly dismissed.

2. The fact of REA's bankruptcy more than four years after the commencement of this action does not change the result. The action was commenced by REA's

new owners for their own benefit. As such, it was barred at the outset by the principles underlying the *Bangor Punta* decision. To alter the result because of REA's subsequent bankruptcy would allow the law to rest not upon a foundation of reason but rather upon the fortuities of timing and would allow the resurrection of actions already long-past barred. As the District Court reasoned, "[t]he illogic of allowing REA to recover now only serves to underscore the artificiality of an exception to *Bangor Punta* which would permit a corporation to recover only if it became bankrupt during the pendency of the proceeding" (406 F. Supp. at 1395; App. 18a). Moreover, bankrupt or not, REA cannot meet the objection that any harm done by the defendants prior to the sale of REA in 1969 constituted, in actuality, harm to the prior-owner railroad defendants themselves (417 U.S. at 712), so that neither's REA's new owners nor REA's post-1969 creditors are entitled to any recovery. *See* 406 F. Supp. at 1936; App. 18a. The claim, if any, of REA employees and pre-1969 creditors are not involved in this action. *See,* opinion of the Court of Appeals in this case, 554 F.2d 1200, 1201 (D.C. Cir. 1977); App. 7a.

3. The presence of defendants additional to REA's prior owners does not affect or limit the application of the *Bangor Punta* doctrine. In determining REA's standing in accordance with the *Bangor Punta* decision, Travelers and the railroads who owned REA are indistinguishable, as they are alleged to have acted in concert with respect to all of REA's factual theories.

As noted earlier, there are no facts alleged in the complaint which relate to separate conduct undertaken or alleged to have been undertaken by Travelers without the participation of or agreement with, the railroads. This was never seriously disputed by REA in the District Court or otherwise.

Allowing REA to continue its action against Travelers or other non-shareholder defendants would thwart application of the *Bangor Punta* principles, since *Bangor Punta* is addressed to plaintiff's lack of standing, *not* to the nature of the various defendants and other alleged conspirators and *not* to the presumed need either to "punish" the defendants or deter wrongful conduct by others. (*See* 417 U.S. at 718, n. 14).

> "If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of a legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning." 417 U.S. at 717.

Allowing maintenance of this action would encourage "speculation" in rights of action by purchasers of companies with respect to "wrongs done to others" (417 U.S. at 711). As the District Court stated, "REA has not shown any injury which accrued to anyone but the railroad defendants" (406 F. Supp. at 1396; App. 18a).

REA's new owners cannot now contend that they were misled as to the terms and limitations of REA's existing insurance coverage or did not have access to such material when they purchased REA in August, 1969, for not only had the same group been serving as the interim management of REA under a voting trust arrangement immediately prior to their purchase of REA, but no fraud or misrepresentation is even alleged with respect to the sale of shares in 1969. 417 U.S. at 716. This renders inapposite REA's claim that *Bangor Punta* does not apply because fraud is alleged.

REA attempts in other ways to squirm away from the holding of *Bangor Punta* and its clear applicability to the case at bar. For example, REA's claim that *Bangor Punta* was not an antitrust case is patently incorrect. *See* 417 U.S. at 705, 706, 710. Equally specious is its argument that this Court's recent decision in *Illinois Brick Co.* v. *Illinois,* U.S. , 45 U.S.L.W. 4611 (1977), supports REA. Even accepting the dubious assumption that REA's retired employees are "indirect purchasers" of insurance, no retired employee of REA is asserting a claim against any respondent on REA's theory.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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